

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35304

|                        |   |                                  |
|------------------------|---|----------------------------------|
| JEFFERY LEROY ACHESON, | ) | 2009 Unpublished Opinion No. 715 |
|                        | ) |                                  |
| Petitioner-Appellant,  | ) | Filed: December 8, 2009          |
|                        | ) |                                  |
| v.                     | ) | Stephen W. Kenyon, Clerk         |
|                        | ) |                                  |
| STATE OF IDAHO,        | ) | THIS IS AN UNPUBLISHED           |
|                        | ) | OPINION AND SHALL NOT            |
| Respondent.            | ) | BE CITED AS AUTHORITY            |
|                        | ) |                                  |

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed in part, reversed in part, and remanded.

Jeffery Leroy Acheson, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

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MELANSON, Judge

Jeffrey L. Acheson appeals from the district court's order summarily dismissing his application for post-conviction relief. Because we conclude that the district court should have held an evidentiary hearing on one of Acheson's claims, we affirm in part, reverse in part, and remand.

I.

FACTS AND PROCEDURE

Acheson pled guilty to two counts of sexual abuse of a child under sixteen years of age, I.C. § 18-1508. The court sentenced Acheson to a fixed term of ten years on the first count, with a consecutive indeterminate term of fifteen years on the second count. Acheson did not appeal the underlying conviction, but filed a motion for appointment of counsel and a pro se application for post-conviction relief, seeking vacation of his judgment of conviction and dismissal of the underlying charges. Acheson's application alleged ineffective assistance of counsel, including a

conflict of interest, due process violations, and coercion by defense counsel. The district court denied Acheson's request for conflict counsel, pending the district court's determination whether Acheson's claims were meritorious. The state filed a response and a motion to dismiss Acheson's application. Acheson then filed an amended application for post-conviction relief. Thereafter, the district court issued a notice of intent to dismiss, and gave both Acheson and the state twenty days to respond. Only Acheson responded. After considering the response, the district court dismissed Acheson's application. Acheson appeals.

## **II.**

### **STANDARD OF REVIEW**

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.

App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

### III.

## ANALYSIS

### A. Failure to File an Appeal

Acheson argues that his trial counsel was ineffective for failing to file a timely appeal when requested. Acheson asserts that trial counsel urged him to plead guilty because the case would be “easier” on appeal. Acheson also contends that he asked his counsel to file an appeal soon after he was sentenced. Further, Acheson attached to his application a copy of a letter he sent to trial counsel regarding an appeal. It appears from the record that trial counsel denies that Acheson requested an appeal. The district court dismissed this claim because it found that Acheson did not state any grounds for filing an appeal. However, the state on appeal concedes that the district court erred by dismissing this claim because Acheson’s application and trial counsel’s denial raise a genuine material issue of fact. As such, the state stipulates that Acheson should be afforded an evidentiary hearing on the issue of whether he instructed his trial counsel to file an appeal.

An attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). If counsel has consulted with the defendant, then counsel performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with regard to an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). In this context, the term “consult” means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant’s wishes. *Id.* When determining if counsel acted reasonably, courts must take into account all the information counsel knew or should have known. *Id.* at 480.

Here, Acheson and the state agree that Acheson’s application and its accompanying letter raise a genuine issue of material fact as to whether Acheson instructed trial counsel to file an appeal on his behalf. Therefore, the district court erred in dismissing this ineffective assistance of counsel claim without holding an evidentiary hearing.

### B. Conflict of Interest

Acheson asserts that trial counsel was ineffective due to a conflict of interest. Specifically, Acheson claims that trial counsel’s office represented the victim and the victim’s family in a related civil matter, while simultaneously representing Acheson in the underlying criminal case. In addition, Acheson alleges that trial counsel called him a “rat” and advised other

clients not to speak with him. The district court dismissed the conflict of interest claim because Acheson's application failed to demonstrate that trial counsel actively represented a competing interest and how such a conflict of interest adversely affected trial counsel's performance. On appeal, the state asserts that the district court did not err by dismissing this claim because Acheson's application consists of bare allegations and is not supported by any admissible evidence.

Acheson did not attach any additional documents, affidavits, or other admissible evidence to his application supporting his allegations of trial counsel's conflict of interest. Acheson simply repeats the allegations in his application for post-conviction relief, response to the district court's notice of intent to dismiss, and briefs on appeal. Consequently, Acheson did not raise a genuine issue of material fact regarding trial counsel's supposed conflict of interest. The district court is not required to accept an applicant's mere conclusory allegations, unsupported by admissible evidence. *Roman*, 125 Idaho at 647, 873 P.2d at 901; *Baruth*, 110 Idaho at 159, 715 P.2d at 372. Therefore, the district court did not err by dismissing Acheson's claim that trial counsel provided ineffective assistance due to a conflict of interest.

### **C. Coerced Guilty Plea and Trial Counsel's Preparation of the Case**

Acheson's remaining ineffective assistance of counsel claims allege that trial counsel coerced him to plead guilty and did not adequately prepare for the underlying criminal case by failing to investigate and interview certain witnesses. The district court summarily dismissed these claims because Acheson testified at his guilty plea hearing that he was satisfied with trial counsel's representation and investigation of the case.

This Court has held that post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996). Acheson's application directly contradicts his sworn testimony at the time of his guilty plea hearing. At that hearing, the district court conducted the following colloquy:

[COURT]: Has *anyone intimidated you, or threatened you*, or anyone close to you, to make you plead guilty?

[ACHESON]: *No.*

[COURT]: Has anyone offered you a reward or incentive to plead guilty?

[ACHESON]: *No.*

[COURT]: Are you *pleading guilty even though you are innocent*?

[ACHESON]: *No.*

....

[COURT]: When did you decide to plead guilty?

[ACHESON]: This morning.

[COURT]: *Why did you decide to?*

[ACHESON]: *DNA evidence is there, ma'am. It says I did it.*

[COURT]: Have you had enough time to think this over?

[ACHESON]: Yes.

[COURT]: Have you had enough time to talk to a lawyer?

[ACHESON]: We talked.

[COURT]: When you talked, did you tell him what happened or what you could recall of what happened?

[ACHESON]: Yes.

[COURT]: Did he tell you to your satisfaction what your rights and defenses are?

[ACHESON]: Yes, he did.

[COURT]: Did he talk to you about the consequences of pleading guilty on Counts 2 and 3?

[ACHESON]: Yes, he did.

[COURT]: *Are you satisfied with his representation?*

[ACHESON]: *Yes.*

[COURT]: Are there other questions you would like to ask him, or would you like some more time to discuss matters with him?

[ACHESON]: No, ma'am.

....

[COURT]: Are you pleading guilty freely and voluntarily?

[ACHESON]: I am.

(Emphasis added).

Because the allegations contained in Acheson's application were clearly contradicted by his sworn testimony at the guilty plea hearing, we conclude that they do not create a genuine issue of material fact warranting an evidentiary hearing. Other than the allegations contained in his application, Acheson provided no admissible evidence documenting his attorney's alleged threats or lack of preparation. Accordingly, the district court did not err by summarily dismissing these claims.

#### IV.

#### CONCLUSION

The state concedes that Acheson's claim that trial counsel was ineffective for failure to file an appeal when requested creates a genuine issue of material fact. Thus, we reverse the

district court's order of dismissal on that particular claim and remand to the district court for an evidentiary hearing on whether Acheson instructed trial counsel to file an appeal.

Acheson's claim of ineffective assistance of counsel due to a conflict of interest is not supported by admissible evidence. Further, Acheson's bare conclusory allegations do not raise a genuine issue of material fact that his guilty plea was coerced and that trial counsel did not adequately prepare the underlying criminal case. Therefore, the district court did not err by summarily dismissing these remaining claims.

Accordingly, the district court's summary dismissal of Acheson's application for post-conviction relief is affirmed in part, reversed in part, and remanded.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**